UPREME COURT, U. S.

JAN 3 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1969

No. 458

CHARLES JOHNSON; LEO MARANGI;
JOSEPH M. PALLADINO, SR.; JOHN HUNT;
ROBERT W. OSMOND; ALFRED STANLEY HUGHES, JR.;
JAMES H. HUNT; FRANCIS X. RAUSCH

Petitioners

vs.

COMMONWEALTH OF MASSACHUSETTS

Respondent

Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

---

PETITION FOR REHEARING

ROBERT E. SMITH
102 W. Penna. Ave.
Towson, Maryland

Counsel for Petitioner

JOHN PINO,
HARRY B. SHADOAN

Of Counsel

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PETITION FOR REHEARING

Joseph M. Palladino, Sr., one of the Petitioners in the within proceedings, respectfully moves this Court for an order, (1) vacating its denial of the petition for writ of certiorari, entered on December 15, 1969, and (2) granting the Petition.

As grounds for this motion, Petitioner states:

1. THE GRANT OF A MOTION TO STAY THE TEMPORARY INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS IN BYRNE V. KARALEXIS, CIVIL ACTION NO. 69-665-J, OCTOBER 1969 TERM.

On December 15, 1969, the day on which the denial of certiorari was made in the instant case, Mr. Justice Black and Mr. Justice Douglas dissenting, this Court granted a Motion to Stay the Temporary Injunction entered by the United States District Court for the District of Massachusetts, Three-Judge Court, Civil Action No. 69-665-J, filed in this Court by Garrett Byrne, District Attorney for Suffolk County, Commonwealth of Massachusetts.

The stay granted by this Court was in the following words:

"granted pending the timely filing and disposition of an appeal. Should such an appeal not be filed, this stay is to expire automatically. Should such an appeal be timely docketed, this stay is to continue pending the Court's action on the jurisdictional aspect of the case. In the event the appeal is dismissed or the judgment below is summarily affirmed this stay is to expire automatically. Should the Court note probable jurisdiction of the appeal or postpone further consideration of the question of jurisdiction to the hearing on the merits, this stay is to remain in effect pending the issuance of the judgment of this Court."

The substance of the Karalexis decision by the majority of the Three-Judge Court in the United States Dis-

trict Court for the District of Massachusetts, reported in the opinion rendered November 28, 1969, granting a Temporary Restraining Order, was that substantial federal constitutional question was presented by the pleadings and that there was a probability that the plaintiffs (Karalexis) would prevail.

Karalexis made a frontal attack upon the Commonwealth of Massachusetts Obscenity Statute, (Mass. G.L. c 272, Sec. 28a) based upon the recent decision of this Court in Stanley vs. Georgia, 1969, 394 U.S. 557. The U.S. District Court was asked to rule that the Stanley decision extends to a case where the possessors permitted a number of consenting adults to view their possibly obscene picture in a moving picture house.

The Federal Court held that for the purposes of the case before them, they would assume that the film, (I Am Curious, Yellow) was obscene by standards currently applied by the Massachusetts Courts.

In it's ruling, the U.S. District Court by Circuit Judge Aldrich stated in pertinent part:

> "Nonetheless, we think it probable that Roth remains intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned. It is difficult to think that if Stanley has a constitutional right to view obscene films, the Court would intend its exercise to be only at the expense of a criminal act on behalf of the only logical source, the professional supplier. A constitutional right to receive a communication would seem meaningless if there were no coextensive right to receive a communication would seem meaningless if there were no coextensive right to make it. Cf. Griswold vs. Connecticut, 1965, 381 U.S. 479. If a rich Stanley can view a film, or read a book, in his home, a poorer Stanely should be

> free to visit a protected theatre or library. We see no reason for saying he must go alone."

In conclusion, the Court states:

> "We note, accordingly, that this is a decision of probability, not a final holding that the Massachusetts statute is unconstitutional."

It would appear that the statute under consideration by the United States District Court for the District of Massachusetts in the Karalexis case is the same statute (Chapter 272 of the General Laws of the Commonwealth of Massachusetts, Section 28A, as amended.) as was involved in the petition for certiorari to this Court in the Johnson et al. case, No. 458 in this Court.

Should this Court summarily affirm the judgment below, the probable effect would be that a Permanent Injunction would issue from the United States District

Court holding the Massachusetts statute to be unconstitutional in the context of controlled access or circulation of allegedly obscene materials, to interested adults.

Should this Court in the Karalexis case note probable jurisdiction and hear the matter on the merits, the decision of this Court would in essence, as to the merits agree or disagree, or perhaps modify and explain.

In the Palladino case, the Petitioner was operating an adults only bookstore with no independent solicitation of members of the public wherein the publications were held out to be obscene. The publications were for sale to interested adults only and in a true sense the circumstances of sale and offering for sale comport with the con-

cept of a controlled access library.

Petitioner herein proffers that the whole tenor of the matters to be reviewed in Byrne vs. Karalexis bears a striking resemblance to the considerations necessarily involved in the instant case. If the statute is unconstitutional then the criminal conviction of Palladino under such an unconstitutional statute would and should be a nullity.

Should this court decline to vacate its Order denying the petition for writ of certiprari, entered on December 18, 1989, the effect thereof will be to require Petitioner to go to jail to serve his sentence while this Court considers the issues raised in Byrne vs. Karalexis which may be dispositive of the issue of the constitutionality of the Massachusetts obscenity statute (Chapter 272

of the General Laws of the Commonwealth of Massachusetts, Section 28 A, as amended.) Should this Court consider the said statute unconstitutional, Petitioner will be unable to obtain any relief from a jail sentence already served.

For these reasons, therefore, the denial of certiorari as to this Petitioner should be reconsidered to the end that this case be heard and resolved simultaneously with the Lynne vs. Karalexis case.

2. THE VIOLATION OF THE PRINCIPLES OF COLE V. ARKANSAS 222 U.S.196

This Petitioner is entitled as a matter of substantive and procedural due process to have the validity of his conviction in this court appraised "on consideration of the case as in this court appraised "on consideration of the case as the issues were determined in

the trial court." Cole vs. Arkansas 333 U.S. 196, 202. The Commonwealth by its Counsel have violated this fundamental principle of jurisprudence by their Brief in Opposition before this Court as to Petitioner, Palladino.

Petitioner was tried below on the issue of the obscenity of the publications. No issue of pandering was before the trial court to escalate otherwise "borderline" material to "obscene" material. Ginsburg vs. U.S. 383 U.S. 463 (1966)

The Commonwealth in its Brief in Opposition on page 18, relates that the sign on the outside of the store where Petitioner was employed contained the language, "ADULTS ONLY". Another sign near the entrance stated, "NO MINORS ALLOWED"

The Commonwealth in its brief as to this point stated:

"In our view this supposed warning amounts to nothing less than the song of the sirens, luring customers into the store with the promise that provocative material lies just ahead. Thus, in this instance, the court below properly could have affirmed the convictions on these complaints on the ground that the magazines were pandered in the same manner as that of Ginsburg, supra."

This Court in Redrup vs. New York, 386 U.S. 767, and later in Stanley vs. Georgia, 394 U.S. 557, deemed significant the absence of any evidence in the cases before the Court of sale or distribution of the publications in a manner intruding on the privacy of an unwilling individual who wanted to avoid

confrontation with the material, and no sales to minors under any state etc. reflecting a specific and limited concern for juveniles.

Certainly the signs changed by Respondent as pandering, thus in the opinion of the commonwealth, escalating "borderline" material to "obscenity" were only in an effort to comply with the dictates of this Court as understood by this Petitioner.

For offering "borderline" publications in a non-offensive manner, excluding minors, and thus attempting to comply with Breard vs. Alexandria, 341 U.S. 622; Public Utilities Comission vs. Pollak, 343 U.S. 451; Redrup vs. N.Y., supra, and it's progeny; and Stanley vs. Georgia supra, the Commonwealth accuses Petitioner here for the first time of "pandering".

Yet if the "borderline" publications are offered in other than an "Adults Only" store, in conjunction with news publications and magazines of general interest, and where no effort is made to exclude minors, the Commonwealth then argues;

"Government has the right to take such action as necessary to prevent persons browsing in book stores from such personal affronts..." Page 19, Brief in Opposition.

To paraphrase a popularly heard expression, "You are condemned to damnation if you do, and you are condemned to damnation if you don't."

This is precisely the position of the Petitioner, Palladino. Said Petitioner was thereby deprived of his right to have his conviction reviewed on the basis of

the theory of the original prosecution. Contrariwise, Petitioner has both denied any right to a trial on the new theory advanced by the Commonwealth in this Court as argued in his brief in opposition. This combination of circumstances is grossly violative of the principles of Colombe, supra, as to call for a re-evaluation of the denial of certiorari and to permit Petitioner's conviction to be appraised by this Court on the basis of the charges actually made against him and considered by the trial court.

3. THE CONFLICT BETWEEN DECISIONS ON THE NECESSITY FOR REQUIRING THE PROSECUTION TO AFFIRMATIVELY PROVE "PRURIENT APPEAL" AND "CONTEMPORARY COMMUNITY STANDARDS"

The Supreme Judicial Court of the Commonwealth of Massachusetts, affirmed the conviction of Petitioner, Palladino,

based on a trial record barren and devoid of any affirmative showing by the prosecution that the material appealed to prurient interest of any persons, or that the material exceeded or affronted contemporary community standards in the representation or depiction of sex or nudity.

This is in conflict with the relevant decisions of various appellate courts as follows:

a. U.S.A. vs. Klaw, 350 F. 2d 155 (CA-2)

"Absolutely no evidentiary basis from which to recognize any appeal to the prurient interest of the deviate or typical recipient...Because there was insufficient evidence for the jury to consider Nutrix material obscene under any proper view of the Roth test, the

"motion for directed verdict of acquittal should be granted." See footnote 14.

b. In Re. Giannini, 72 Cal Rptr. 655

"We conclude that the convictions must be set aside because the prosecution failed to introduce any evidence of community standards, either that Iser's conduct appealed to prurient interest or offended contemporary standards of decency."

c. House vs. Commonwealth, 169 S.E. 2d 572 (September 5, 1969 - Va.)

"The question presented to us is whether the evidence on behalf of the Commonwealth was sufficient to warrant a finding that tested by the principles outlined in this instruction these publications are obseene. We agree with the defendant that it was not sufficient." ..."In the first place

"there is no evidence that according to or applying contemporary community standards the cominant theme of the magazines in question appealed to the prurient interest of the reader, or that they were patently offensive because they affronted contemporary community standards relating to the description or representation of sexual matters. That is, there is no evidence that these publications were offensive because they affronted contemporary community standards relating to the descriptions of such matters."

In a decision rendered by the Supreme Court of the Commonwealth of Pennsylvania after the filing of the Petition for Writ of Certiorari herein and the Commonwealth's Brief in Oppos-

ition, Duggan vs. Guild Theatre, Inc. 258 At. 2d. 858, decided on November 11, 1969. The Court there reversed in part based on the absence of any affirmative evidence by the District Attorney in the trial that the material had any prurient appeal or that it affronted contemporary community standards. In the absence of such evidence, the burden of proof failed, and the case reversed.

Certainly, to comport with due process Petitioner should have been adjudged "Not Guilty" in the absence of any constitutionaly relevant evidence adduced by the prosecution of "prurient appeal" and that the materials affronted "contemporary community standards."

The decisions referenced herein, several of which were handed down after the Petition for Writ of Certiorari was filed,

makes it clear that the Courts of the Commonwealth of Massachusetts in failing to require any affirmative evidence on the issue of "prurient appeal" or "contemporary community standards" are certainly in conflict with the prevailing legal theory, and the recent appellate court decisions.

For this reason, Petitioner is entitled to have the Order denying his Petition for Writ of Certiorari vacated and the writ thereafter granted, and the Supreme Judicial Court of Massachusetts reversed.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for writ of certiorari, Petitioner, Palladino, prays that this Court grant the petition and review the judgment and

ruling belc

Respectfully submitted.

Robert Eugene Smith
Counsel for Petitioner

January 9, 1970

CERTIFICATE OF COUNSEL

As counsel for Petitioner, Ihereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 (2)

Robert Eugene Smith
Counsel for Petitioner

January 9, 1970

IN THE

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THE COMMONWEALTH OF MASSACHUSETTS

Certificate of Service

I hereby certify that on this 8th day of January, 1970, copies of this Petition were mailed, postage prepaid, to the following:

Robert H. Quinn, Esquire
Attorney General of the Commonwealth of Massachusetts
Boston, Massachusetts

John Wall, Esquire
Assistant Attorney General
Chief, Criminal Division
Boston, Massachusetts

Lawrence P. Cohen, Esquire
Deputy Assistant Attorney General
Boston, Massachusetts

Garrett H. Byrne, Esquire
District Attorney, Suffolk County
Boston, Massachusetts

Theodore A. Glynn, Jr.
Assistant District Attorney
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I further certify that all parties required to be served have been served.

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